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Supreme Court, U.S.
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No. 97-659

In The

Supreme Court of the United States

October Term, 1997

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, S. DAVID BERST and ROBERT L. STROUP, III,

Petitioners,

vs.

JERRY TARKANIAN and LOIS TARKANIAN,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Nevada

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INTRODUCTION

Respondents' opposition brief is most remarkable for what it does not say. Not one sentence, not one line, not one citation is devoted to challenging the proposition that there is a split of authority in the lower federal and state courts on the federal question whether an appellate court has a constitutional duty to conduct an independent, *de novo* evaluation of a venue ruling when the fundamental right to an impartial factfinder is implicated. Rather, the division of authority in the lower courts is real and substantial, a fact that the NCAA demonstrates in its certiorari petition, and that respondents do not dispute.

As discussed more fully below, instead of addressing the conflict in the lower courts, respondents resort to three essentially jurisdictional arguments, none of which are valid. First, respondents incorrectly contend that the first question the NCAA raises in its certiorari petition – whether there is a fundamental due process right to an impartial factfinder in civil cases – was not raised and preserved below. Second, respondents misunderstand the independent and adequate state ground doctrine, asserting that the doctrine applies to bar review here because the Supreme Court of Nevada used an abuse of discretion standard based on state law when evaluating the trial court's venue ruling in this case. Third, respondents incorrectly argue that there is *no* federal question presented in this case.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THE FIRST QUESTION PRESENTED IN THE PETITION IS PROPERLY BEFORE THIS COURT

That the NCAA briefed in the Nevada Supreme Court, and thus preserved, the first question presented in the certiorari petition could not be clearer. The very first sentence of the NCAA's argument section of its opening brief in that court states as follows: "The NCAA's right to an impartial trial is the most fundamental of all constitutional rights." *See* Appendix to Reply Brief (Reply App. A at App. 1). The second sentence quotes this Court's decision in *In re Murchison*, 349 U.S. 133, 136 (1955), which declares that "[a] fair trial in a fair tribunal is a basic requirement of due process." (Reply App. A at App. 1). The NCAA cited several of this Court's precedents involving fair trial issues throughout its brief and argued that the Constitution requires *de novo* appellate review under these circumstances. (*Id.* at App. 1-App. 7). The NCAA continued to press the issue in its reply brief, as well, declaring that "[c]ontrary to Tarkanian's improper assertion, this appeal is about the most fundamental of all constitutional rights – the right to an impartial trial." (Reply App. B at App. 9).

Under clearly established and well-settled principles of this Court's jurisprudence, the questions presented in the NCAA's certiorari petition are properly before the Court. Under 28 U.S.C. § 1257, "[t]he rule now is that a federal claim cannot be considered by the Court unless it has been *either* raised in the state court or considered and resolved by the state court." R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 122 (7th ed. 1993) (and cases cited therein) (hereinafter "*Supreme*

Court Practice") (emphasis original). Thus, the question is not necessarily whether the Supreme Court of Nevada expressly decided the federal issue, but whether the NCAA properly raised and preserved the issue, which it did, as demonstrated above. Moreover, the NCAA's claim of a fundamental constitutional right to an impartial fact-finder necessarily was decided by the Supreme Court of Nevada in adopting a standard of review for the trial court's venue ruling.

Further, a "litigant is not bound to follow any particular form of words or phrases. It is essential only that he bring the federal claim and the grounds therefor to the state court's attention with fair precision." *Id.* at 118. In light of these well-established principles, the first question presented in the NCAA's certiorari petition is properly before this Court.

In any event, it ultimately does not matter whether this Court determines that the NCAA's first question presented was properly preserved as a separate issue. That is, the question whether there is a fundamental right to an impartial factfinder in civil cases is necessarily inherent in the second question presented which was decided below. In other words, the question of what level of appellate review should apply to venue rulings when the right to a fair trial is necessarily implicated, likely will depend on the nature and importance of the underlying federal constitutional right at stake. *See Id.* at 137 (once the Court has exercised jurisdiction over a state court judgment, "the parties may enlarge upon the questions they do present as long as the enlargement may be deemed fairly included or comprised within the stated questions"). Thus, briefing the merits of the level of

appellate review question necessarily will require some attention to the first question presented, and it is only out of an abundance of caution and to fully apprise the Court of the nature of the NCAA's constitutional claim that the NCAA raised the first question as a separate issue.

II. THE NEVADA SUPREME COURT'S JUDGMENT DOES NOT REST ON INDEPENDENT AND ADEQUATE STATE GROUNDS

In this case, the choice of the appellate standard of review of a venue ruling that implicates the constitutional right to a fair and impartial trial is the federal question, and one that the Supreme Court of Nevada necessarily resolved against the NCAA. If the NCAA is correct that federal constitutional principles require *de novo* review, then the Nevada abuse of discretion standard is preempted and cannot constitute an independent and adequate state law basis for the decision. *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985) ("[W]hen resolution of the state procedural law question depends on a federal constitutional ruling, the state law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded").

The independent and adequate state ground doctrine simply does not apply when, as here, the NCAA challenged below – on federal constitutional grounds – the very state law standard the state court applied. *Supreme Court Practice* at 132 (jurisdiction exists when the majority opinion of the state supreme court "explicitly or impliedly recognize[s] the presence of a federal question and render[s] a decision thereon"). Moreover, the dissenting

opinion acknowledges this federal challenge by beginning with a quotation from this Court's decision in *Sheppard v. Maxwell*, 384 U.S. 333 (1966), and refers to "the constitutional dimensions of this case." *See* Pet. App. 7.

III. THE PETITION PRESENTS SUBSTANTIAL, UNRESOLVED FEDERAL QUESTIONS

Respondents' assertion that this case raises no federal questions is simply incorrect, as the opinions of the Supreme Court of Nevada and the NCAA's briefs filed in that court document. Essentially, respondents' argument fails for the same reason as the preceding one: in selecting the appropriate standard of appellate review in this context, the Supreme Court of Nevada necessarily decided a substantial federal question, one that has divided the lower federal and state courts. The standard of review issue is "more than a formal" federal question; it is "not so absolutely devoid of merit as to be frivolous" nor is it "explicitly foreclosed by prior decisions of the Supreme Court". *Supreme Court Practice* at 117.

IV. RESPONDENTS' ARGUMENTS ON THE MERITS ARE IRRELEVANT TO THE QUESTION WHETHER THIS CASE MERITS AN EXERCISE OF THE COURT'S PLENARY REVIEW

Finally, respondents make a misplaced effort to argue the merits of the underlying venue motion at the certiorari stage of this case, relying heavily on disputed facts that are not documented in the opposition brief. A brief in opposition should present arguments for denying the petition, including addressing "perceived misstatement

of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted." Sup. Ct. R. 15(2); *see also, Supreme Court Practice* at 193. Respondents do not raise any perceived misstatement of fact or law. Rather, they present their interpretation of the factual record in support of their position for denial of the NCAA's change of venue motion.

Respondents argue facts and evidence not in the record before the Court. Respondents' argument to deny certiorari based upon their version of the underlying factual record is misplaced, especially in light of their failure to document many of the "facts" on which they rely. *See, Supreme Court Practice* at 352 (although the Court's rules do not require record cites at the certiorari stage, nevertheless "for the facts that are critical or disputed references to the record below can and should be supplied").

Finally, the decision on whether to grant or deny the NCAA's change of venue motion is not as one-sided as respondents would suggest. Because a majority of the Supreme Court of Nevada adopted an abuse of discretion standard, the outcome was obvious. The dissenting opinion, however, shows that the outcome might well have been different had an independent, *de novo* review occurred.

CONCLUSION

Petitioners respectfully request that this Court grant the petition for a writ of certiorari and set this case for plenary review.

Respectfully submitted,

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APPENDIX A

Excerpt from Appellants' Consolidated Opening Brief in the Supreme Court of the State of Nevada, pp. 23-28.

* * *

ARGUMENT

I. STANDARD OF REVIEW

A. The Right To An Impartial Trial Is The Most Vital Of All Constitutional Rights

The NCAA's right to an impartial trial is the most fundamental of all constitutional rights. *See, Williams v. Chrans*, 945 F.2d 926, 945 (7th Cir. 1991), quoting, *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1111 S.Ct. 2720, 2745 (1991); *Bailey v. Systems Innovation, Inc.*, 852 F.2d 93, 98 (3rd Cir. 1988), citing, *Nebraska Press Association v. Stuart*, 427 U.S. 539, 550, 96 S.Ct. 2791 (1976). "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625 (1955). It is "abundantly clear that fairness in a jury trial, whether criminal or civil in nature, is a vital constitutional right." *Bailey*, 852 F.2d at 98. The courts have stated:

> It is fundamental that every litigant who is entitled to a trial by jury is entitled to an impartial jury, free to the furthest extent practicable from extraneous influences that may subvert the fact-finding process.

Haley v. Blue Ridge Transfer Co., Inc., 802 F.2d 1532, 1535 (4th Cir. 1986).

This vital constitutional right is violated where "even the probability of unfairness" exists. *In re Murchison*, 349 U.S. at 136. "Because **even a single partial juror violates a defendant's constitutional right**, a judge must always act to diligently preserve that right." *United States v. Angulo*, 4 F.3d 843, 848 (9th Cir.1993) (emphasis added).

B. A Change Of Venue Must Be Granted Where There Is A Reasonable Likelihood Of Bias

A change of venue must be granted where, due to local prejudice, there is a "reasonable likelihood" that an impartial trial cannot be held. NRS 13.050 (2); *see also, e.g., Sheppard v. Maxwell*, 384 U.S. 333, 363, 86 S.Ct. 1507, 1522; *Martinez. v. Superior Court*, 629 P.2d at 503. **"[T]he phrase 'reasonable likelihood' denotes a lesser standard of proof than 'more probable than not.' "** *People v. Williams*, 774 P.2d 146, 153 (Cal. 1989), quoting, *Martinez*, 629 P.2d at 503.

A change of venue is designed "to prevent even the probability of unfairness" which results from pretrial publicity and which "tempts" the average juror "to forget the burden of proof" which is applicable in a given case. *Estes v. Texas*, 381 U.S. 532, 543, 85 S.Ct. 1628, 1633 (1965); *Sheppard*, 384 U.S. at 352, 86 S.Ct. at 1517. The courts have stated:

> The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and **not by any outside influence, whether private talk or public print.**

Sheppard, 384 U.S. at 351 (emphasis added).

> **Legal trials are not like elections,** to be won through the use of the meeting-hall, the radio, and the newspaper.

Gentile, 501 U.S. at 1070 (emphasis added.)

A change of venue must therefore be granted where pretrial publicity has created a "probability of unfairness." *Estes,* 381 U.S. at 543, 85 S.Ct. at 1633. This probability may be established by public opinion surveys (*Martinez,* 629 P.2d at 503; *Maine v. Superior Court,* 438 P.2d 372, 377 (Cal. 1968)), or by examining the content of inflammatory pretrial publicity. *People v. Hamilton,* 774 P.2d 730, 737-38 (Cal.1989). Actual bias need not be proved. *Maine,* 438 P.2d at 377. The *Estes* court stated:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But **our system of law has always endeavored to prevent even the probability of unfairness. . . .** To perform its high function in the best way **"justice must satisfy the appearance of justice."**

Id. (citations omitted) (emphasis added).

The law is sympathetic toward granting a change of venue where pretrial publicity has promoted widespread bias in the community. *Maine,* 438 P.2d at 377; *Tidwell,* 473 P.2d at 753.

> "[The defendant expresses] **grave doubt that jurors who are subjected to pretrial publicity seriously adverse to a defendant's interests can efface it altogether from their conscious and unconscious minds,** no matter how hard they try to do so. The law must be sympathetic to

> that viewpoint, and must make that sympathy meaningful in a practical world of public trials." (citation omitted). In many cases that are the focus of unusual public attention, the effect of the prejudicial pretrial disclosures or **widespread community antagonism can be substantially overcome by a change of venue.**

Maine, 438 P.2d at 377 (emphasis added).

Thus, where extensive and partial pretrial publicity has occurred, the court should not hesitate to grant a venue change.

> **"Why courts should hesitate to grant a change of venue in a proper case, I cannot understand.** . . . Why? [Is] it feared the defendant would escape [liability] if he were allowed a fair trial?"

Tidwell, 473 P.2d at 755, quoting, *People v. Suesser*, 132 Cal. 631, 635, 64 P. 1095, 1097 (emphasis added).

C. The Appellate Court Must Independently Review The Circumstances To Determine Whether There Is A Reasonable Likelihood That Even A Single Juror Will Be Biased

"Appellate tribunals have the duty to make an independent evaluation of the circumstances" when reviewing a change of venue motion. *Sheppard*, 384 U.S. at 362, 86 S.Ct. at 1522. An independent review is required because of the vital constitutional issue at hand, and because of the difficulty of effacing prejudicial publicity from the minds of prospective jurors. *Id.*

In light of this duty to conduct an independent evaluation, there is disagreement regarding the standard of

review on a change of venue issue. Under the traditional view, appellate courts would conduct an independent review of the record to determine whether the trial court abused its discretion in denying the change of venue. *See e.g., State v. Ware*, 338 N.W.2d 707, 713 (Iowa 1983); *cf. Ford v. State*, 102 Nev. 126, 130, 717 P.2d 27, 29 (1986). The court would find an abuse of discretion where the trial court: 1) failed to consider all relevant factors; 2) failed to properly weigh the relevant factors; 3) ignored or failed to consider essential facts or evidence; or 4) rendered a judgment based on erroneous factual or legal premises. *See, e.g., James v. Jacobson*, 6 F.3d 233, 239 (4th Cir.1993); *Jardien v. Winston Network, Inc.*, 888 F.2d 1151, 1159 (7th Cir. 1989); *In re Paoli Railroad Yard*, 585 A.2d 608, 610 (Pa. 1991). In this regard, **an abuse of discretion also occurs where an independent review of the circumstances shows that a real probability of prejudice does, in fact, exist.** *State v. Thompson*, 806 P.2d 1251, 1255 (Wash.1991); *State v. Wood*, 349 N.W.2d 294, 295 (Minn.1984); *cf. State v. Rogers*, 101 Nev. 457, 705 P.2d 664, 668 (1985) (Nevada Supreme Court reversed lower court on issue of impartiality where it found that a probability of prejudice existed).

An increasing number of courts now conduct a complete *de novo* review where the lower court's decision is not based on the testimony of live witnesses but, as in the instant case, is merely based upon the same affidavits and exhibits which are before the appellate court.[13] *See, e.g.,*

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[13] Indeed, some jurisdictions have interpreted *Sheppard* to hold that appellate courts must review the change of venue issue completely *de novo*. *See, e.g., Maine*, 438 P.2d 372 (Cal.1968).

Olson v. District Court, 271 N.W.2d 574, 579 (N.D.1978); *State v. Moyd*, 619 P.2d 1107, 1109 (Haw.App.1980); *State v. Warwick*, 555 P.2d 1386, 1388 (Wash.1976). These courts have stated that deference should only be given to the lower court's decision where the lower court had the advantage of observing, first hand, the credibility of witnesses or veniremen. *Id.*; *cf.*, *Patton v. Yount*, 467 U.S. 1025, 1038, 104 S.Ct. 2885 (1985).

In this case, the lower court refused to hold an evidentiary hearing to consider the expert testimony regarding the deep and widespread bias in Las Vegas. The NCAA implored the lower court to hold an evidentiary hearing in light of the court's duty to utilize every safeguard to ensure that an impartial trial could be held. 7 ROA 1338. Yet, the lower court refused to utilize this safeguard after Tarkanian voiced his opposition to the hearing. 7 ROA 1296, 1516. Thus, the lower court merely had the same affidavits and exhibits which are now before this Court. Accordingly, there is no legal basis for giving deference to the lower court's ruling. *See*, *Moyd*, 619 P.2d at 1109; *Olson*, 271 N.W.2d at 579 (N.D.1978); *Warwick*, 555 P.2d at 1388; *Patton*, 467 U.S. at 1038. A *de novo* review of this matter is therefore required. *Id.*; *see also*, *Maine*, 438 P.2d 372 (Cal.1968).

The lower court's decision must be reversed regardless of the standard of review adopted by this Court. Indeed, the record shows that, in additional [sic] to making numerous factual and legal errors, the lower court abused its discretion because an independent review of the circumstances overwhelmingly establishes that a real probability of prejudice does, in fact, exist. *See*, *State v.*

Rogers, 705 P.2d at 668; *State v. Thompson*, 806 P.2d at 1255; *State v. Wood*, 349 N.W.2d at 295.

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APPENDIX B

Excerpt from Appellants' Consolidated Reply Brief in the Supreme Court of the State of Nevada, pp. 1-5.

* * *

II. ARGUMENT

A. INTRODUCTION

1. Tarkanian's Brief Fails To Recognize The Vital And Fundamental Constitutional Issue At Hand

Tarkanian's answering brief ignores the constitutional nature of the issue at hand and, instead, attempts to divert this Court's attention by making irresponsible and false accusations regarding the NCAA's motives. *See, Ans.Br.*, pp. 33-34. This diversionary tactic only confirms the legitimacy of the NCAA's appeal. Indeed, Tarkanian has not only exhibited a strategy of improperly influencing the Las Vegas community through inflammatory statements to the local media,[1] but has now attempted to improperly influence this Court by falsely speculating that the NCAA has filed the instant appeal for improper reasons. *Id.* This irresponsible conjecture has no place in appellate briefs. *See, Allianz Insurance Co. v. Gagnon*, 109 Nev. 990, 860 P.2d 720, 725 (1993).[2]

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[1] *See*, Appellants' *Op.Br.*, pp. 9-16.

[2] The NCAA's constitutional right to an impartial trial is gravely endangered not only by the widespread local prejudice, but also by Tarkanian's strategy of improperly appealing to the emotions of the court and the already biased jury pool.

This appeal is about the most fundamental of all constitutional rights – the right to an impartial trial. *See, Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1111 S.Ct. 2720, 2745 (1991); *Nebraska Press Association v. Stuart*, 427 U.S. 539, 550, 96 S.Ct. 2791 (1976). Every litigant is constitutionally entitled to an impartial trial free from "extraneous influences that may subvert the fact-finding process." *Haley v. Blue Ridge Transfer Company, Inc.*, 802 F.2d 1532, 1535 (4th Cir. 1986). The Court "must always act diligently to preserve [this] right." *United States v. Angulo*, 4 F.3d 843, 848 (9th Cir. 1993).

A change of venue must therefore be granted where, due to local prejudice, there is a "reasonable likelihood" that "even a single juror" will be biased. *Sheppard v. Maxwell*, 384 U.S. 333, 363, 86 S.Ct. 1507, 1522 (1966); *Angulo*, 4 F.3d 843, 848 (9th Cir. 1993). "Reasonable likelihood" denotes a standard of proof less than "more probable than not." *Martinez v. Superior Court*, 629 P.2d 502, 503 (Cal. 1981). Indeed, a change of venue must be granted "to prevent even the probability" that local prejudice will influence the average juror's conclusion. *Estes v. Texas*, 381 U.S. 532, 543, 85 S.Ct. 1628, 1633 (1965). The United States Supreme Court has stated:

Tarkanian's counsel has previously been cited for "misconduct" as a result of employing this type of strategy in prior cases. *Las Palmas Associates v. Las Palmas Center Associates*, 235 Cal.App.3d 1220, 1 Cal.Rptr.2d 301 (1992). The *Las Palmas* court held that counsel "blatantly" committed "prejudicial" misconduct as a result of trying to appeal to the emotions of the court by making improper suggestions regarding motives and opposing counsel. *Id.*

> A fair trial in a fair tribunal is a basic requirement of due process. . . . [O]ur system of law has always endeavored to *prevent even the probability of unfairness*. . . . To perform its high function in the best way *"justice must satisfy the appearance of justice."*

Estes, 381 U.S. at 543, 85 S.Ct. at 1633 (emphasis added).

> *Legal trials are not like elections*, to be won through the use of the meeting-hall, the radio, and the newspaper.

Gentile, 501 U.S. at 1070 (emphasis added).

Thus, the Court must not hesitate to grant a change of venue where doubts exist as to impartiality. *People v. Tidwell*, 473 P.2d 753, 755 (Cal. 1990). All doubts regarding impartiality must be resolved in favor of a change of venue. *Martinez v. Superior court*, 629 P.2d 502, 508 (Cal. 1981). It is within this fundamental constitutional framework that the NCAA will address Tarkanian's answering brief.

B. TARKANIAN'S ANSWERING BRIEF IS FRAUGHT WITH ERRORS

Tarkanian's brief is fraught with assertions that are without factual or legal merit. The NCAA will expose each of Tarkanian's erroneous assertions by addressing the factual record and established law. *Tarkanian simply cannot refute the fact that the Las Vegas community is, and has been for many years, highly biased in favor of Tarkanian and against the NCAA.*

1. Tarkanian's Proposed Standard Of Review Is Nonsensical And Legally Unfounded

Tarkanian's answering brief makes the incredulous argument that the standard of review is "manifest abuse of discretion" rather than "abuse of discretion" as set forth by the NCAA. *Ans.Br.*, p. 4. Tarkanian's argument is nonsensical and attempts to make a distinction where no difference exists.

As stated in the NCAA's opening brief, the abuse of discretion standard recognizes that the lower court's abuse can be "manifested" in numerous ways, including: 1) failure to consider all relevant factors; 2) failure to properly weigh the relevant factors; 3) ignoring or failing to consider essential facts or evidence; or 4) rendering a decision on erroneous factual or legal premises. *Op.Br.*, p. 26, *citing, e.g., Jacobson*, 6 F.3d at 239; *Jardien v. Winston Network, Inc.*, 888 F.2d 1151, 1159 (7th Cir. 1989); *see also, Walen v. Hansen*, 933 F.2d 1390, 1394 (8th Cir. 1991). Thus, contrary to Tarkanian's assertion, the phrases "abuse of discretion" and "manifest abuse of discretion" simply refer to the same standard. *See, James v. Jacobson*, 6 F.3d 233, 239 (4th Cir. 1993).

Furthermore, when the constitutional issue of due process and impartiality is involved, the appellate court has a "duty to make an independent evaluation of the circumstances." *Sheppard*, 384 U.S. at 362, 86 S.Ct. at 1522. This Court and other jurisdictions will reverse the lower court's decision where the independent review reveals that a "probability of prejudice" does, in fact, exist. *State v. Rogers*, 101 Nev. 457, 705 P.2d 664, 668 (1985), *citing,*

Crew v. State, 100 Nev. 38, 675 P.2d 986, *citing*, *State v. Wixon*, 631 P.2d 1033, 1037-38 (Wash.App. 1981).[3]

Finally, a *de novo* review is appropriate where, as in this case, the lower court's decision was not based upon the testimony of live expert witnesses but, rather, upon the same affidavits and exhibits which are now before this court. *Olson v. District Court*, 271 N.W.2d 574, 579 (N.D. 1978); *see also*, *People v. Tidwell*, 473 P.2d 748, 753 (Cal. 1970). Specifically:

> [W]here the trial court's determination was not based upon the testimony of live witnesses, but rather upon the same affidavits and exhibits before us on the record, our review, therefore, is in effect *de novo*.

Olson, 271 N.W.2d at 579.

Thus, Tarkanian's standard of review argument is void of legal merit. This is the type of case that warrants *de novo* review. *Id.* Yet, regardless of the standard applied, the lower court must be reversed because it made numerous factual and legal errors. *See*, *Op.Br.*, pp. 28-59. Indeed, an independent review of the circumstances reveals that a "reasonable likelihood" of prejudice does, in fact, exist. *Id.*, pp. 43-55.

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[3] *See also*, *State v. Ward*, 349 N.W.2d 294, 295 (Minn. App. 1984); *State v. Albrecht*, 516 N.W.2d 776, 783-84 (Wisc.App. 1994); *State v. Ware*, 338 N.W.2d 707, 713 (Iowa 1983).